APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED AND FILED DECEMBER 11, 2007

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-2451

ELMER VAN GORDER,

Plaintiff-Appellant,

v.

GRAND TRUNK WESTERN RAILROAD, INC., a division of Canadian National,

Defendant-Appellee.

Argued: September 17, 2007
Decided and Filed: December 11, 2007

Before: BATCHELDER and GILMAN, *Circuit Judges*; VARLAN, *District Judge*.*

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* The Honorable Thomas A. Varlan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

Appendix A

OPINION

ALICE M. BATCHELDER, Circuit Judge. Plaintiff-Appellant Elmer Van Gorder ("Van Gorder") appeals the district court's order granting summary judgment in favor of Defendant-Appellee Grand Trunk Western Railroad ("Grand Trunk") in this negligence action filed pursuant to the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.* Van Gorder claims that the district court erred in finding that there were no genuine issues of material fact regarding the reasonableness of Grand Trunk's railcar inspections and that he had not established a prima facie negligence case. Finding no merit in Van Gorder's contentions, we **AFFIRM**.

I. BACKGROUND

Van Gorder began working at Grand Trunk on July 22, 1970, more than 33 years prior to the incident in question, which occurred on October 17, 2003. Grand Trunk initially hired Van Gorder as a T-carman. From 1981 until the time of the incident, Van Gorder served as a carman at the General Motors loading dock on David Road, at Grand Trunk's Flint Yard in Flint, Michigan.

Van Gorder's main task on the day of the incident was to remove bridge plates between the loaded bi-level railroad cars and close the doors of the cars to prepare them for transport. Prior to this preparation and consistent with the railroad's usual practice, other

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Grand Trunk employees conducted two inspections of the railcars on which Van Gorder worked. Those "pre-trip" inspections are intended to discover defects in the cars and entail, among other things, looking at the doors to see visible problems, and opening, but not closing the doors.

In the course of his duties, Van Gorder attempted to close the "clamshell door" on one of the railcars. The door closed about halfway, or two to three feet, and then abruptly stopped, causing Van Gorder to stumble and his hands to slip off the door handle, resulting in an injury to his shoulder. Van Gorder is currently receiving approximately $2,600 per month in Railroad Retirement Disability because of his shoulder injury, for which he had replacement surgery on August 17, 2004.

Following the incident, Van Gorder immediately reported his injury to his superiors, then went to the hospital for examination. Robert F. Miller, Car Foreman, John P. Jacques ("Jacques"), Mechanical Department Supervisor and Technical Officer — Pool Operations, Ron Lord, Flint Assistant Superintendent, Hunt Carey, Flint Superintendent, and David Cromie, Risk Mitigation Officer, all inspected the railcar after Van Gorder returned from the hospital. Van Gorder was present for at least some of the inspection.

During the inspection, the Grand Trunk employees determined — through the process of elimination —

that the canopy bolt on top of the AR door, which at least partially controlled the door's movement, was worn. Although the door opened properly, because of the condition of the bolt, the door would "hang up" and become stuck while it was being closed.

The defective bolt — or, at least, the defective condition of the bolt — was not visible from the ground. After the incident, Jacques got into a man-lift machine and viewed the door and bolt from above. The wear on the bolt was not visible from this vantage point either, because it was in an area "sandwiched between the roof and the canopy." That is, the defect would only manifest itself when someone attempted to close the door, and was only visible when the top portion of the door was taken apart. An inspection from above, either in a man-lift machine or from the ladders on the sides of the railcar, would not reveal the defect. Moreover, Grand Trunk does not allow its employees to climb up the ladders to the roof of the railcar without the proper safety equipment.

Van Gorder filed this negligence action against Grand Trunk on February 2, 2005, pursuant to FELA, 45 U.S.C. § 51, *et seq.* On September 27, 2006, the district court issued its opinion and order granting summary judgment in favor of Grand Trunk, concluding that no genuine issue of material fact remained for trial and that Van Gorder had failed to produce evidence from which a jury could find that Grand Trunk was negligent. Van Gorder timely filed this appeal.

II. STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment, using the same standard applied by the district court. *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We must review all the evidence, facts, and inferences in the light most favorable to the nonmoving party. *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

In order to defeat a summary judgment motion, the nonmoving party must "show sufficient evidence to create a genuine issue of material fact." *Prebilich-Holland v. Gaylord Entm't Co.*, 297 F.3d 438, 442 (6th Cir. 2002) (citing *Klepper v. First Am. Bank*, 916 F.2d 337, 342 (6th Cir. 1990)). The nonmoving party must provide more than a scintilla of evidence. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 252 (1986). That is, the nonmoving party must present sufficient evidence to permit a reasonable jury to find in that party's favor. *Id.* Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *See also Hartsel v. Keys*, 87 F.3d

795, 799 (6th Cir.1996). The party bearing the burden of proof must present a jury question as to each element of its case. *Hartsel*, 87 F.3d at 799 (citing *Celotex*, 477 U.S. at 322).

III. ANALYSIS

Van Gorder sued Grand Trunk under FELA, specifically alleging that Grand Trunk conducted an unreasonable and negligent inspection of a railcar that directly resulted in his injury. FELA provides in pertinent part:

> Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51. The statute contains a negligence standard. Consequently, to survive Grand Trunk's motion for summary judgment, Van Gorder needed to present evidence sufficient to raise a genuine issue of material fact as to every element of his negligence claim. *Celotex*, 477 U.S. at 322.

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In order to present a prima facie case under FELA, Van Gorder must prove that: (1) he was injured within the scope of his employment; (2) his employment was in furtherance of Grand Trunk's interstate transportation business; (3) that Grand Trunk was negligent; and (4) that Grand Trunk's negligence played some part in causing the injury for which he seeks compensation under FELA. *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 808 (6th Cir. 1985) (internal citations omitted); *see also Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326, 330 (1958).

We will view the evidence in the light most favorable to Van Gorder, the nonmoving party. It is undisputed that Van Gorder injured his shoulder during the course of his employment, and he was furthering Grand Trunk's interstate transportation business in preparing the railcars for loading and transport. Therefore, Van Gorder has satisfied the first two of the required FELA elements. The fatal flaw in Van Gorder's complaint, however, is that he cannot show that Grand Trunk was negligent.

To succeed on his FELA claim, Van Gorder must "prove the traditional common law elements of negligence; duty, breach, foreseeability, and causation." *Adams v. CSX Transportation Inc.*, 899 F.2d 536, 539 (6th Cir. 1990) (quoting *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987)); *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 258 (6th Cir. 2001). Van Gorder correctly contends that FELA relaxes a plaintiff's standard of proof regarding causation. *Rogers v.*

Missouri Pacific RR. Co., 352 U.S. 500, 506 (1957) (ruling for the plaintiff-employee and stating that, under FELA, the "test of a jury case is whether the proofs justify with reason the conclusion that employer negligence played any part, even in the slightest, in producing the injury."). Therefore, *if* Grand Trunk were negligent, Van Gorder need only show that its negligence contributed even slightly to his injury. But, contrary to Van Gorder's assertion, the relaxed causation standard under FELA does not affect his obligation to prove that Grand Trunk was in fact negligent. *Perkins v. American Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 598-99 (6th Cir. 2001).[1] FELA does not lessen a plaintiff's burden to prove the elements of negligence.

Under FELA, a railroad has a duty to provide its employees with a reasonably safe workplace; this does not mean that a railroad has the duty to eliminate all workplace dangers, but only the "duty of exercising reasonable care to that end." *Baltimore & Ohio S. W. R. Co. v. Carroll*, 280 U.S. 491, 496 (1930). Grand Trunk does not dispute that it had a duty to exercise reasonable care to protect Van Gorder, an employee. Thus, Van Gorder established the duty component of the negligence standard. Van Gorder cannot, however, show that Grand Trunk breached that duty.

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1. *Perkins* was decided under the Jones Act, 46 U.S.C. § 688. The court, however, stated that the Jones Act simply provides for seamen parallel rights that FELA provides railroad employees. *Perkins*, 246 F.3d at 598.

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A railroad breaches its duty to its employees when it fails to use ordinary care under the circumstances or fails to do what a reasonably prudent person would have done under the circumstances to make the working environment safe. *Tiller v. Atlantic C. L. R. Co.*, 318 U.S. 54, 67 (1943); *Aparicio v. Norfolk & W. Ry.*, 84 F.3d 803, 811 (6th Cir. 1990). That is, a railroad breaches its duty when it "'knew, or by the exercise of due care should have known' that prevalent standards of conduct were inadequate to protect [the plaintiff] and similarly situated employees." *Aparicio*, 84 F.3d at 811 (quoting *Urie v. Thompson*, 337 U.S. 163, 178 (1949)). A railroad must act reasonably and use ordinary care to protect its employees.

Van Gorder specifically alleges that Grand Trunk's pre-trip inspections were not reasonable and that by performing only those inspections, Grand Trunk breached its duty of care. Van Gorder contends that the manner in which the visual inspections were performed was not thorough enough to reveal the defective bolt, and that the pre-trip inspection was not undertaken with ordinary care because it did not include closing the clamshell doors, which would have exposed the defect. In attempting to prove that Grand Trunk's pre-trip inspections were unreasonable, Van Gorder relies almost exclusively on the sworn affidavit of his purported expert, Michael Micek ("Micek"). But Micek did not inspect the door of the railroad car at issue, nor does he state in his affidavit that he has any particular familiarity with either the type of car or the type of door at issue. He fails to point to any standard of care to which Grand

Trunk failed to conform and he does not explain what kind of inspection would have been reasonable. Micek's affidavit simply makes the conclusory statement that Grand Trunk did not act reasonably because in its pre-trip inspections, it did not discover the defective bolt.

Van Gorder first claims that Grand Trunk would have discovered the defect if it had viewed the door from the roof of the railcar. In his affidavit, Micek claims that Grand Trunk employees could have climbed the ladder on the side of the rail car to its "upper most height" and seen the defect in the bolt. But Micek did not actually see the car, or climb the ladder. Jacques — who personally inspected the car — testified at his deposition that he could not see the defect in the bolt either from above the car or from the ground below. Furthermore, Jacques stated that it would be dangerous for an employee to climb the ladder to its upper-most heights without the proper safety equipment. There is no question that Jacques has substantial experience in dealing with the bi-level auto carrier railcars with clamshell doors, like the one in question. Nothing in the record establishes that Micek has any such experience.

Most significant here, however, was Micek's inability to explain what would have constituted a proper inspection. Micek provided no specific information to explain why Grand Trunk's inspection was not reasonable. He provided no evidence to dispute Grand Trunk's specific, first-hand testimony that the defective bolt was not visible from any angle, and that to observe the defect, Grand Trunk had to take the door apart.

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Van Gorder cannot raise a genuine issue of fact regarding the reasonableness of Grand Trunk's inspection by suggesting that it should have used a different method to perform the inspection, when the method he advocates would not have revealed the defect that led to his injury.

Van Gorder next claims that Grand Trunk merely had to close the door to discover the defect; that closing the doors during the pre-trip inspection would be very easy for Grand Trunk; and that failure to do so made the pre-trip inspection unreasonable. We need not decide what might be easy for the railroad, nor need we indulge Grand Trunk's hypothetical assertions that, in this case, closing the door during the pre-trip inspection might simply "have provided us with a different plaintiff." We must decide only whether Grand Trunk conducted a reasonable inspection and exercised ordinary care. Van Gorder has not presented evidence and the record does not contain evidence sufficient to permit a reasonable jury to find that Grand Trunk's failure to require closing the door as part of the pre-trip inspection of the car made that inspection unreasonable.

Jacques testified that the pre-trip inspectors would ordinarily recognize a problem with the door upon opening it. Van Gorder himself testified that he had never encountered a door with a defect like the one in question, and that if a door were going to be defective, he "would usually know in the first few inches" of closing it. Van Gorder agreed that the door in question was

unusual, and he presented no evidence that Grand Trunk knew or had reason to know of the particular defect in the door or that such a defect would cause the injury Van Gorder sustained. In short, Van Gorder presented no evidence from which a jury could find that Grand Trunk did not exercise ordinary care in performing the pre-trip inspection of the railroad cars, or that its method of pre-trip inspection of the cars was unreasonable.

Under FELA, the "test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part . . . in producing the injury." *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 116 (1963); *Rogers*, 352 U.S. at 506. If the record contains evidence from which the court could draw the conclusion that the employer's negligence played any part in the plaintiff's injury then it must send the case to the jury, even if the evidence would also allow the jury to find for the employer. *Id.* at 116-17. But a plaintiff cannot benefit from FELA's relaxed causation standard unless he can prove that the employer was negligent in the first place, and this Van Gorder has wholly failed to do.

The record in this case does not contain evidence sufficient to preserve a genuine issue of fact material to an element of Van Gorder's claim, namely, that Grand Trunk was negligent in its inspection of the car door. In the absence of that evidence, summary judgment for Grand Trunk was appropriate. *Celotex*, 477 U.S. at 322; *see also Hartsel*, 87 F.3d at 799.

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DECIDED AND FILED SEPTEMBER 27, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 05-CV-70380-DT

ELMER VAN GORDER,

Plaintiff,

vs.

GRAND TRUNK WESTERN RAILROAD, INC.,
a division of Canadian National,

Defendant.

September 27, 2006, Argued
September 27, 2006, Decided
September 27, 2006, Filed

OPINION AND ORDER REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on September 29, 2006

PRESENT: Honorable Gerald E. Rosen

United States District Judge

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I. INTRODUCTION

This action arises out of an incident which occurred on October 17, 2003, when Plaintiff Elmer Van Gorder, while employed as a carman by Defendant, Grand Trunk Western Railroad, Inc., ("Grand Trunk"), injured his right shoulder when he attempted to close the left clamshell door of a bi-level auto carrier railcar. On February 2, 2005, Mr. Van Gorder filed the instant negligence lawsuit against Grand Trunk pursuant to the Federal Employer's Liability Act, 45 U.S.C. § 51, *et seq.* Discovery has closed and Defendant has moved for entry of summary judgment in its favor. Plaintiff has responded to Defendant's Motion and Defendant has replied.

The Court heard oral argument on this matter on July 20, 2006. At the conclusion of this hearing, the Court took the matter under advisement.

Meanwhile, counsel for the parties advised the Court that the parties were pursuing extra-judicial facilitation in an attempt to resolve this matter and, accordingly, requested that the Court withhold deciding the summary judgment motion. On September 5, 2006, however, the parties informed the Court that they failed to reach a resolution through facilitation and therefore, requested that the Court issue its decision. Accordingly, the Court now issues this Opinion and Order setting forth its ruling on the matter.

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II. PERTINENT FACTS

Plaintiff Elmer Van Gorder, born July 4, 1952, is a life-long resident of Durand, Michigan. At the time of the accident giving rise to this action, Van Gorder had worked for the Defendant railroad for approximately 33 years, since July 22, 1970.

Van Gorder was hired by the Defendant as a T-carman and has continued to work as a carman out of the Defendant's Flint Yard until the time of the subject October 17, 2003 incident. Plaintiff's primary job since 1981, was working at the GM loading dock at David Road, where the accident occurred. He worked the day shift, 7:00 a.m. to 3:00 p.m., Monday through Friday.

On October 17, 2003, Plaintiff was placing bridge plates between bi-level cars that had been delivered to the David Road loading dock. Bi-level railcars were delivered to the dock previously prepped and inspected by the Grand Trunk. On the day of the accident, the railcars had been pre-inspected by the Grand Trunk and consequently, the railcar doors were open. Van Gorder was working with another crew member, Doug Haskins, removing bridge plates from the railcars. During the course of his normal duties, Van Gorder attempted to close the clamshell door of the Grand Trunk bi-level car. In the course of this process, the door suddenly jammed and stopped, causing Plaintiffs hands to slip off the end of the door and he fell, injuring his right shoulder. John P. Jaques, Mechanical Department Supervisor and Technical Officer – Pool Operations, also verified that

during the inspection of the door following Plaintiffs injury, he was only able to close the door partway.

Following Plaintiff's accident, Robert F. Miller, Car Foreman, along with Jaques, Flint Assistant Superintendent Ron Lord, Flint Superintendent Hunt Carey, and Risk Mitigation Officer David Cromie performed a mechanical inspection of railcar TTGX9985596. During this post-accident inspection, it was determined that the canopy bolt on the top of the cars AR door was defective and worn. This defective bolt caused the door to become stuck during closing. At issue in this case is whether this defect should have been discovered by Grand Trunk during its pre-delivery inspection of the railcar, ergo providing safe working conditions for Plaintiff. The car was allegedly inspected twice by Grand Trunk prior to Van Gorder's accident: once upon arrival at the Grand Trunk David Road Yard and once when the door was inspected solely by opening, but not closing the door.

A. Car Inspection Procedures at David Road

The GM plant at David Road in Flint, Michigan produces only trucks and SUVs. Therefore, all auto carriers delivered at David Road for loading are bi-level railcars. Bilevel auto railcars are delivered on the midnight shift or early in the day shift at David Road and spotted along the loading docks. The David Road loading docks have six tracks, each with the capacity of five bi-level cars.

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Auto carrier bi-level railcars delivered to the David Road GM facility are generally pre-inspected at Bristol Yard in Flint, prior to their delivery to the David Road loading docks in Flint. Inspection of the cars is a multi-step process that is inconsistent in its execution and is not entirely clear from the testimony of record. Apparently, the pre-inspection includes opening the doors of the railcar to determine whether any lubrication, cleaning or any repair is needed prior to being delivered to the David Road loading dock. If, during the pre-inspection, an exception is taken to the condition of the railcar and/or door of the railcar, it will be repaired on site, if possible or "bad-ordered" and moved to a repair facility, if it cannot be repaired on site.

There were times when the bi-level railcars would arrive at the David Road loading dock without having been previously prepped and inspected. This lack of a pre-inspection was indicated by closed doors on the railcars. If the railcars had not been inspected and prepped, it would then be the job of Van Gorder and Haskins' to open the doors on the cars and inspect the A and B deck for safety appliances, chocks, broken straps, etc., prior to placing in the bridge plates for loading. Regardless of this inspection status of the cars, it was the job of Van Gorder and his crew member, Doug Haskins, to put in bridge plates between the bi-level cars on the A and B decks of the railcars to enable the loading of all five railcars on the six tracks at the dock. The actual loading of the cars would be performed by

GM and/or its contractor. Once the railcars are loaded by GM and/or its contractor, the next step was for Van Gorder and Haskins to inspect the cars to insure they were properly chocked and strapped down. They would remove the bridge plates and close the railcar doors. Van Gorder testified that the procedure at the time of the accident was for his partner to walk ahead of him on the bottom deck and take down the top bridge plates. His partner would step on the release lever and open the door six to eight inches and Van Gorder would then shut the doors.

B. Incident of October 17, 2003

Van Gorder reported for work at the David Road yard shortly before the start of the shift at 7:00 a.m. on October 17, 2003, and the accident occurred at approximately 12:15 p.m. The docks were loaded with railcars and some of the railcars had already been loaded with GM trucks and SUVs, with the doors closed. Most of the railcars had been pre-inspected at the prep track at the Bristol Road yard, as the doors of the railcars were locked open.

Van Gorder and Haskins, worked in their normal manner, as described above removing bridge plates from the railcars. Haskins was working approximately two cars ahead of Van Gorder releasing the pins for the doors. The doors on the railcar at issue here, car number TTGX985596, were locked open, indicating that it had been pre-inspected in Bristol. Van Gorder, therefore, did not inspect the doors.

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Van Gorder had just completed inspecting the A-deck (bottom deck) of TTGX985596 when he got down to close the doors. Van Gorder was standing on the ground facing the left clamshell door as he attempted to close the door, pulling from left to right using both hands, with his right hand doing most of the pulling. The door initially moved freely and with no resistance. After moving the door approximately half way closed, the door, without warning, completely stopped causing both of his hands to slip off the end of the door and he nearly fell down. Van Gorder then felt a sharp pain in his right shoulder as well as in his fingers. Van Gorder had experienced problems with doors "hanging up" in the past, but not to the extent of the incident that caused his injury. Immediately after the incident, Van Gorder informed Haskins that he had injured his shoulder and hands as a result of attempting to close the door. He was taken to McLaren Medical Center for treatment.

C. Investigation of the Incident

Mr. Miller, Van Gorder's supervisor and Car Foreman, was advised by telephone of the alleged injury incident. On the day of the incident, Miller spoke with Plaintiff at the doctor's office where Van Gorder was being treated, and was present when Plaintiff was interviewed concerning the accident by Defendant's Risk Mitigation Officer, Dave Cromie. Also present during Van Gorder's recorded interview was John Jaques, Mechanical Supervisor and Technical Officer. Following the interview with Van Gorder, a mechanical inspection of railcar TTGX9985596 was undertaken.

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D. Mechanical Inspection of Railcar TTGX9985596

Railcar TTGX9985596 was taken by the switch crew to the RIP (repair-in-progress) track in Flint, for mechanical inspection. At 3:30 p.m., on October 17, 2003, Mr. Miller, Car Foreman at Flint RIP track, performed an inspection of the railcar along with John P. Jaques, Mechanical Department supervisor and Technical Officer – Pool Operations, Flint Assistant Superintendent Ron Lord, Flint Superintendent Hunt Carey, and Risk Mitigation Officer David Cromie. Initially, Miller and Jaques were unable to visually determine any problem with the railcar door. However, after being elevated over the top of the roof of the railcar in a man lift bucket inside the repair facility, they were able to determine that the canopy bolt on the rooftop of the AR door was worn. Miller explained that on the roof of the car, where the door hooks into the top of the car, there is a pivot arm or bolt upon which the door swings or rotates as the door opens and closes. The mechanical inspection revealed that the AR door on the railcar was able to be opened without problems. The defect in the door manifested itself in closing the door, by stopping, before it was able to be fully closed. According to the unsworn affidavit of Mr. Jacques, the Bi-level auto carrier TTGX9985596 was not owned by the Defendant railroad, but was owned by the Union Pacific Railroad and interchanged with the Defendant railroad for delivery at the GM plant serviced by the David Road loading facility.

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D. Plaintiff's Complaint in this Action

Van Gorder initiated this action in this Court on February 2, 2005. In his Complaint, Plaintiff alleged that Defendant Grand Trunk was negligent in failing to provide the Plaintiff with a safe place to work; failing to properly warn the Plaintiff of possible hazards to his health; failing to keep its equipment and property in a proper and safe manner properly inspect, repair, and maintain its equipment and property; failing to comply with State and Federal Statutes including, but not limited to 45 U.S.C. § 51 et seq. and related Federal and State Rules ad Regulations promulgated thereunder, including, but not limited to 49 C.F.R § 215; failure of the Defendant to properly operate the job, together with other negligent acts or omissions; and in the general reckless, careless and negligent manner in which the defendant, its agent, servants and employees conducted its business.

Van Gorder alleged these acts caused him to suffer physical and emotional injuries, metal anguish, embarrassment, humiliation, disability, lost wages, denial of social pleasure and enjoyments, change of lifestyle, and future damages.

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III. DISCUSSION

A. STANDARDS APPLICABLE TO MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is proper "'if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Fed. R. Civ. P. 56(c).

Three 1986 Supreme Court cases — *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); — ushered in a "new era" in the standards of review for a summary judgment motion. These cases, in the aggregate, lowered the movant's burden on a summary judgment motion.[1] According to the *Celotex* Court,

> In our view, the plain language of *Rule 56(c)* mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof. *Celotex*, 477 U.S. at 322.

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1. "Taken together the three cases signal to the lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials." 10A C. Wright, A. Miller, M. Kane, *Federal Practice & Procedure*, § 2727, at 35 (1996 Supp.)

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After reviewing the above trilogy, the Sixth Circuit established a series of principles to be applied to motions for summary judgment. They are summarized as follows:

> * The movant must meet the initial burden of showing "the absence of a genuine issue of material fact" as to an essential element of the non-movant's case. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.
>
> * The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment."
>
> * The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.
>
> * The trial court has more discretion than in the "old era" in evaluating the respondent's evidence. The respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, "[w]here the record taken as a whole could not lead a rational trier of fact to find" for the

> respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is plausible.

Betkerur v. Aultman Hospital Association, 78 F.3d 1079, 1087 (6th Cir. 1996). *See also*, *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989). The Court will apply the foregoing standards in deciding Defendant's motion for summary judgment in this case.

B. PLAINTIFF HAS FAILED TO MAKE OUT A CLAIM OF NEGLIGENCE

The Federal Employers' Liability Act, ("FELA"), provides, in part,

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

45 U.S.C. § 51.

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To present a *prima facie* case under the FELA, a plaintiff must prove that: (1) the plaintiff was injured while in the scope of employment; (2) the plaintiff's employment is in furtherance of the railroad's interstate transportation business; (3) the employer was negligent; and (4) the employer's negligence played some part in causing the injury for which compensation is sought under the FELA. *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 808 (6th Cir. 1985). Federal common law controls what constitutes negligence under the Federal Employers' Liability Act. *Urie v. Thompson*, 337 U.S. 163, 174, 69 S.Ct. 1018, 1027 (1949) (footnote omitted).

To prove that the employer was negligent, it is well-settled that the FELA plaintiff must "'prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation.'" *Adams v. CSX Transportation, Inc.*, 899 F.2d 536, 539 (6th Cir. 1990) (quoting *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir. 1987)); *Hardyman v. Norfolk & Western Ry. Co.*, 243 F.3d 255, 258 (2001).[2] It is incumbent on the

2. Although Plaintiff is correct in that FELA has a relaxed standard of proof regarding *causation* ("Under this statute [FELA] the test of a jury case is simply is whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury," *Rogers v. Missouri Pacific RR Co.*, 352 U.S. 500, 506 (1957)), it is only this one *prima facie* element of a negligence claim that is relaxed; it does not relieve Plaintiff of the burden of proving duty and breach of that duty. *See McKennon v. CSX Transportation, Inc.*, 897 F. Supp. 1024, 1026 n. 1 (M.D. Tenn. 1994), aff'd 56 F. 32 64 (6th Cir. 1995) *see also, Perkins v. American Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 597-99 (6th Cir. 2001).

plaintiff to prove all of the elements of his claim, including duty and breach of duty. *Aparicio v. Norfolk & Western Ry. Co.*, 84 F.3d 803, 810 (6th Cir. 1996), *abrogated on other grounds, Reeves v. Sanderson Plumb. Prod., Inc.*, 530 U.S. 133 (2000); *Armstrong v. Kansas City Southern Ry. Co.*, 752 F.2d 1110, 1113 (5th Cir. 1985).

Railroads have a duty to furnish employees with a "reasonably safe place in which to work and such protection [against the hazard causing the injury] as would be expected of a person in the exercise of ordinary care under those circumstances." *Urie v. Thompson, supra*, 337 U.S. at 179 n. 16, 69 S.Ct. at 1029 n. 16, (citing *Sadowski v. Long Island R.R. Co.*, 292 N.Y. 448, 55 N.E.2d 497, 501 (1944)). Plaintiff's FELA claim in this case is predicated upon Grand Trunk's alleged negligent pre-inspection of the subject railcar. However, Plaintiff has failed to present evidence of the proper standard of care, i.e., "the ordinary care under the circumstances," by which such an inspection is to be measured.

Plaintiff purports to rely on the Affidavit of his expert witness, Michael Micek. Mr. Micek's affidavit, however, does not set forth any industry standard as to railcar inspection. Rather, he only conclusorily states that "[h]ad Grand Trunk Western Railroad, Incorporated conducted thorough and proper inspections of said car, it should have discovered that the AR door top canopy bolt. . . was defective as it was worn." Nowhere in Mr. Micek's affidavit does he say what the industry standard is.

Appendix B

Plaintiff also relies upon 49 C.F.R. § 215.9(c) and argues that this regulation requires that rail cars be defect free upon arrival and departure and that the railroad cannot move a defective car except to move it to the repair lot. In this regard, he also points to paragraph 6 of the Micek Affidavit in which Mr. Micek states:

> The Federal Railroad Administration rules and regulations regarding inspection of equipment applies to bi-level auto carrier[s] including the rail car TTGX985596 in question. Those regulations require that a car cannot be put into service unless the care is 100% defect free.

The regulation relied upon by Plaintiff and his expert, 49 C.F.R. § 215.9, provides, in pertinent part, as follows:

> (a) A railroad freight car which has any component described as defective in this part may be moved to another location for repair only after the railroad has complied with the following:
>
> (1) A person designated under § 215.11 shall determine:
>
> (i) That it is safe to move the car; and

> (ii) The maximum speed and other restrictions necessary for safely conducting the movement; [and]
>
> * * *
>
> (3) A tag or card bearing the words "bad order" of "home shop for repairs" . . . shall be securely attached to each side of the car. . . .
>
> * * *
>
> (c) Movement of a freight car under paragraph (a) of this section may be made only for the purpose of effecting repairs. . . .

As the Court observed at the July 20, 2006 hearing, this regulation sets a strict liability standard. FELA, however, is a negligence statute. The Court notes that although the Second and Seventh Circuits have stated that the principle of "negligence *per se*" reaches injuries resulting from a FELA employer's regulatory violations, *see Morant v. Long Island Railroad*, 66 F.3d 518, 523 (2nd Cir. 1995); *Walden v. Illinois Central Gulf Railroad*, 975 F.2d 361, 364 (7th Cir. 1992), the Sixth Circuit has not so ruled.

In any event, even if our Circuit would hold that a regulatory violation establishes negligence *per se* for purposes of a FELA cause of action, the regulation relied upon by Plaintiff, 49 C.F.R. § 215.9, does not apply to

the alleged defective component at issue. This regulation only applies to freight cars having components "described as defective *in this part*," i.e., in Part 215 of Title 49. Parts 103 through 129 of Title 49, 49 C.F.R. §§ 103-129, describe the defective components to which § 215.9 applies. These include defective wheel flanges (§ 215.103); defective axles (§ 215.105); defective bearings (§ 215.107-119); defective frames or springs (§ 215.119); defective car center sills, plates or coupler carriers (§ 215.121); defective couplers (§ 215.123-125); defective draft gears (§ 215.127); and defective cushioning devices (§ 215.129). Clamshell doors, which is the component part alleged to be defective in this case, are *not* among the defective components to which § 215.9 applies.

Plaintiff has not pointed to any cases construing this regulation nor has the Court found any such cases. However, as the subparts enumerated above make clear, only parts which affect the *movement of the car itself*, appear to be subject to the prohibitions of 49 C.F.R. § 215.9. Freight car doors do not affect the movement of the car itself. Therefore, the Court finds Plaintiff's reliance on 49 C.F.R. § 215.9 misplaced. Nothing alleged to have occurred in this case constitutes a violation of § 215.9 and, accordingly, the principle of "negligence *per se*," even if it were recognized in this Circuit, is inapplicable.

In sum, Plaintiff Van Gorder's failure to meet his burden to establish all of the elements of claim of negligence entitles Defendant Grand Trunk to summary judgment on Plaintiff's FELA claim.

Appendix B

CONCLUSION

For the reasons stated above in this Opinion and Order,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment is granted and Plaintiff's Complaint is dismissed, in its entirety, with prejudice.[3] Let Judgment be entered accordingly.

s/ Gerald E. Rosen
Gerald E. Rosen
United States District Judge

Dated: September 27, 2006

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3. Although Plaintiff attempted to argue at oral argument that, based upon the last paragraph of Mr. Micek's Affidavit, he can make out a strict liability claim under the Federal Safety Appliance Act ("FSAA"), contrary to Plaintiff's assertions, he did not allege a violation of the Safety Appliance Act in his Complaint; he alleged only claims of negligence under FELA.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING FILED FEBRUARY 20, 2008

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 06-2451

ELMER VAN GORDER,

Plaintiff-Appellant,

v.

GRAND TRUNK WESTERN RAILROAD, INC., A DIVISION OF CANADIAN NATIONAL,

Defendant-Appellee.

ORDER

BEFORE: BATCHELDER and GILMAN, Circuit Judges; and VARLAN,* District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en

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* Hon. Thomas A. Varlan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR PANEL REHEARING FILED APRIL 11, 2008

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

September Term 2007

01cv01595

No. 06-5294

Role Models America, Inc.,

Appellant

v.

Pete Geren, Secretary of the Army and
Margaret Spellings, Secretary of Education,

Appellees

BEFORE: Randolph, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of appellant's petition for panel rehearing filed on March 21, 2008, it is

ORDERED that that petition be denied.

Appendix D

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Michael C. McGrail
Deputy Clerk